

TUPE – who picks up the tab for incorrect employee information?

Whenever the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) applies to the transfer of a business or a service, the outgoing employer must give the new employer specific information about the employees who are going to transfer. This information is listed in TUPE regulation 11. If the outgoing employer fails to comply with regulation 11, the new employer can claim for compensation under regulation 12.

This week, the Employment Appeal Tribunal published its decision in a case brought by a new employer (*Born*) that had received incorrect information from an outgoing employer (Spire) in a TUPE transfer scenario. The information in question related to a Christmas bonus that was paid to employees – Spire told Born that the bonus was non-contractual when, in fact, it was found to be contractual in nature. Spire said this meant Born had failed to comply with TUPE regulation 11 and sought compensation of over £100,000.

Spire’s claim failed. The Employment Appeal Tribunal said that TUPE regulation 11 did not require Born to give information about whether particulars of employment were contractual. Therefore, when Born incorrectly told Spire that the Christmas bonus was non-contractual, it was not in breach of its TUPE obligations so no compensation would be due.

When employers are sharing information prior to a TUPE transfer, it is very common to ask for information that goes beyond what is listed in TUPE regulation 11. This case is a warning to employers receiving this information to remember that they will not have a remedy under TUPE if it transpires that the additional information is incorrect. The only way to gain that extra protection would be for the parties to enter into a commercial agreement which contains well-drafted warranties and indemnities from the outgoing employer.

[Carla Whalen](#)
Associate
+44 (0)20 8394 6419
Carla.Whalen@russell-cooke.co.uk

This material does not give a full statement of the law. It is intended for guidance only and is not a substitute for professional advice. No responsibility for loss occasioned as a result of any person acting or refraining from acting can be accepted by Russell-Cooke LLP. © Russell-Cooke LLP. March 2017

russell-cooke.co.uk